



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 6 May 2021¹

Case C-819/19

**Stichting Cartel Compensation,
Equilib Netherlands BV**

v

**Koninklijke Luchtvaart Maatschappij NV,
Martinair Holland NV,
Deutsche Lufthansa AG,
Lufthansa Cargo AG,
British Airways plc,
Société Air France SA,
Singapore Airlines Ltd,
Singapore Airlines Cargo Pte Ltd,
Swiss International Air Lines AG,
Air Canada,
Cathay Pacific Airways Ltd,
Scandinavian Airlines System Denmark-Norway-Sweden
SAS AB
SAS Cargo Group A/S**

(Request for a preliminary ruling from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands))

(Reference for a preliminary ruling – Article 101 TFEU and Article 53 of the EEA Agreement – Implementing rules of Article 103 TFEU – Transitional regime of Articles 104 and 105 TFEU – Agreements and concerted practices in respect of several elements of the pricing of airfreight services (imposition of fuel and security surcharges, refusal to pay commission on surcharges) – Action for damages – Direct effect – Competence of the national courts)

¹ Original language: English.

I. Introduction

1. Stichting Cartel Compensation and Equilib Netherlands BV ('the applicants') seek a declaratory judgment and damages against the defendants² for acting in breach of Article 101(1) TFEU and Article 53(1) of the Agreement on the European Economic Area ('the EEA Agreement') by having coordinated various elements of the price to be charged for airfreight services on routes between airports within and from the European Union and the European Economic Area ('the EEA').
2. That practice allegedly took place during a period in which the Council had not yet adopted implementing provisions for certain parts of the air transport sector in order to give 'full effect' to the principles laid down in Article 101 TFEU. For that reason, the defendants claim that the competence to enforce Article 101 TFEU remained solely with the administrative authorities of the Member States and the European Commission under the 'transitional regime' provided for in Articles 104 and 105 TFEU.
3. The present case raises the issue of the competence of national courts to apply Article 101(1) TFEU and Article 53(1) of the EEA Agreement to anticompetitive practices which occurred during that 'transitional regime'. However, that perhaps technical and temporarily circumscribed issue, in turn, gives rise to a more fundamental issue concerning the (inter)dependence of public (administrative) and private (judicial) enforcement of EU competition rules.

II. Legal framework

A. *The TFEU*

4. Articles 101 to 105 TFEU lay down the rules on competition. The following provisions are relevant for the present case:

'Article 101

(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

...

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

– any agreement or category of agreements between undertakings,

² Koninklijke Luchtvaart Maatschappij NV; Martinair Holland NV; Deutsche Lufthansa AG; Lufthansa Cargo AG; British Airways plc; Société Air France SA; Singapore Airlines Ltd; Singapore Airlines Cargo Pte Ltd; Swiss International Air Lines AG; Air Canada; Cathay Pacific Airways Ltd; Scandinavian Airlines System Denmark-Norway-Sweden; SAS AB; and SAS Cargo Group A/S (collectively 'the defendants').

- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

...

Article 103

(ex Article 83 TEC)

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

...

- (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
- (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

...

Article 104

(ex Article 84 TEC)

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Article 105

(ex Article 85 TEC)

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).³

B. The EEA Agreement

5. The EEA Agreement aims ‘to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogenous [EEA]...’.³

6. Article 6 of the EEA Agreement states:

‘Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty [on the Functioning of the European Union] and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European [Union] given prior to the date of signature of this Agreement.’

7. Article 53 of the EEA Agreement is identical in substance to Article 101 TFEU.

8. Pursuant to Article 55 of the EEA Agreement:

‘1. Without prejudice to the provisions giving effect to Articles 53 and 54 as contained in Protocol 21 and Annex XIV of this Agreement, the EC Commission and the EFTA Surveillance Authority provided for in Article 108(1) shall ensure the application of the principles laid down in Articles 53 and 54.

The competent surveillance authority, as provided for in Article 56, shall investigate cases of suspected infringement of these principles, on its own initiative, or on application by a State within the respective territory or by the other surveillance authority. The competent surveillance authority shall carry out these investigations in cooperation with the competent national authorities in the respective territory and in cooperation with the other surveillance authority, which shall give it its assistance in accordance with its internal rules.

If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

³ Agreement on the European Economic Area (OJ 1994 L 1, p. 3), Article 1(1).

2. If the infringement is not brought to an end, the competent surveillance authority shall record such infringement of the principles in a reasoned decision.

The competent surveillance authority may publish its decision and authorise States within the respective territory to take the measures, the conditions and details of which it shall determine, needed to remedy the situation. It may also request the other surveillance authority to authorise States within the respective territory to take such measures.’

III. Facts, national proceedings, and the question referred

9. On 9 November 2010, the European Commission adopted Decision C(2010) 7694 final relating to a proceeding under Article 101 [TFEU], Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport⁴ (Case COMP/39258 – Airfreight) (‘the 2010 Decision’).⁵

10. In Articles 1 to 4, the 2010 Decision contained findings that a number of carriers were involved in the coordination of various elements of the price to be charged for airfreight services on routes between airports within the European Union and/or the EEA; between airports within the Union and/or the EEA and third countries; and between airports within the Union and Switzerland, in breach of Article 101 TFEU, Article 53 of the EEA Agreement, and Article 8 of the Swiss Agreement, for different periods in time (‘the conduct in question’). Pursuant to the 2010 Decision, the overall duration of that infringement lasted from December 1999 to February 2006.

11. In its judgments of 16 December 2015, the General Court of the European Union partially annulled the 2010 Decision with regard to the applicants in the cases before it.⁶ In essence, the General Court found that the 2010 Decision was vitiated by contradictions between its grounds and the operative part.⁷

12. On 17 March 2017, the Commission adopted Decision C(2017) 1742 final relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement (Case AT.39258 – Airfreight) (‘the 2017 Decision’).⁸ The 2017 Decision maintained the substance of the 2010 Decision. It also confirmed the overall duration of the infringement from December 1999 to February 2006.

⁴ Hereafter ‘the Swiss Agreement’.

⁵ Case C.39258 – Airfreight (OJ 2014 C 371, p. 11).

⁶ Judgments of 16 December 2015, *Air Canada v Commission* (T-9/11, not published, EU:T:2015:994); of 16 December 2015, *Koninklijke Luchtvaart Maatschappij v Commission* (T-28/11, not published, EU:T:2015:995); of 16 December 2015, *Japan Airlines v Commission* (T-36/11, not published, EU:T:2015:992); of 16 December 2015, *Cathay Pacific Airways v Commission* (T-38/11, not published, EU:T:2015:985); of 16 December 2015, *Cargolux Airlines v Commission* (T-39/11, not published, EU:T:2015:991); of 16 December 2015, *Latam Airlines Group and Lan Cargo v Commission* (T-40/11, not published, EU:T:2015:986); of 16 December 2015, *Singapore Airlines and Singapore Airlines Cargo v Commission* (T-43/11, not published, EU:T:2015:989); of 16 December 2015, *Deutsche Lufthansa and Others v Commission* (T-46/11, not published, EU:T:2015:987); of 16 December 2015, *British Airways v Commission* (T-48/11, not published, EU:T:2015:988); of 16 December 2015, *SAS Cargo Group and Others v Commission* (T-56/11, not published, EU:T:2015:990); of 16 December 2015, *Air France-KLM v Commission* (T-62/11, not published, EU:T:2015:996); of 16 December 2015, *Air France v Commission* (T-63/11, not published, EU:T:2015:993); and of 16 December 2015, *Martinair Holland v Commission* (T-67/11, EU:T:2015:984).

⁷ See, for example, judgment of 16 December 2015, *Air Canada v Commission* (T-9/11, not published, EU:T:2015:994, paragraph 60).

⁸ The 2017 Decision has not been made public. However, a summary of the findings is available. See Summary of Commission Decision of 17 March 2017 – Relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (OJ 2017 C 188, p. 14) (‘the 2017 Decision Summary’).

13. Pursuant to the 2017 Decision Summary, the Commission found that of a number of carriers were involved in a cartel relating to the conduct in question. That conduct infringed Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement. It related to (i) routes between airports within the European Union ('intra-EU routes'); (ii) routes between airports within the Union and airports outside the EEA ('EU-third country routes'); (iii) routes between airports within the EEA ('intra-EEA routes'); (iv) routes between airports in countries that are contracting parties to the EEA Agreement, but are not EU Member States, and airports in third countries ('non-EU EEA third-country routes'); and (v) routes between airports in the Union and Switzerland ('EU-Swiss routes').

14. The 2017 Decision Summary specifies the infringement and the imposition of fines for different time periods with regard to different routes as follows:

- For intra-EU routes, the Commission was competent to find an infringement and impose fines for conduct concerning air transport between EU airports before 1 May 2004. That is because, *before* 1 May 2004, Regulation (EEC) No 3975/87⁹ granted the Commission implementing powers to apply Article 101 TFEU in respect of air transport between EU airports only. Air transport between EU airports and airports in third countries was, however, excluded from the scope of that regulation.
- For EU-third country routes, for the same reasons, the Commission's competence was limited to conduct occurring *after* 1 May 2004.
- For intra-EEA routes, the Commission was competent to find an infringement and impose fines for the whole period from 1999 to 2006.
- For non-EU EEA third-country routes, Decision No 130/2004¹⁰ and Decision No 40/2005¹¹ entered into force on 19 May 2005. From that date onwards, Regulation (EC) No 411/2004¹² and Regulation (EC) No 1/2003¹³ became applicable in the framework of the EEA Agreement. Therefore, the Commission did not find an infringement or impose fines for conduct concerning routes between EEA countries that were not EU Member States and third countries before 19 May 2005.

15. The 2017 Decision has again been challenged before the General Court.¹⁴ Those cases remain pending.

⁹ Council Regulation of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p. 1).

¹⁰ Decision of the EEA Joint Committee of 24 September 2004 amending Annex XIV (Competition), Protocol 21 (On the implementation of competition rules applicable to undertakings) and Protocol 23 (Concerning the cooperation between the surveillance authorities) to the EEA Agreement (OJ 2005 L 64, p. 57).

¹¹ Decision of the EEA Joint Committee of 11 March 2005 amending Annex XIII (Transport) and Protocol 21 (on the implementation of competition rules applicable to undertakings) to the EEA Agreement (OJ 2005 L 198, p. 38).

¹² Council Regulation of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries (OJ 2004 L 68, p. 1).

¹³ Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

¹⁴ Cases *Air Canada v Commission* (T-326/17), *Koninklijke Luchtvaart Maatschappij v Commission* (T-325/17), *Japan Airlines v Commission* (T-340/17), *Cathay Pacific Airways v Commission* (T-343/17), *Cargolux Airlines v Commission* (T-334/17), *Latam Airlines Group and Lan Cargo v Commission* (T-344/17), *Singapore Airlines and Singapore Airlines Cargo PTE v Commission* (T-350/17), *Deutsche Lufthansa and Others v Commission* (T-342/17), *British Airways v Commission* (T-341/17), *SAS Cargo Group and Others v Commission* (T-324/17), *Air France – KLM v Commission* (T-337/17), *Air France v Commission* (T-338/17), and *Martinair Holland v Commission* (T-323/17).

16. At the same time, the applicants initiated civil proceedings against the defendants before the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands). That court explains that those applicant companies were set up specifically to pursue the claims assigned to them for damages arising from the Commission's findings of infringements of competition law.

17. The applicants seek a declaratory judgment and damages. First, they request a finding that the defendants acted unlawfully during the period from 1999 to 2006. That is to say, also prior to (i) 1 May 2004 (for EU-third country routes); (ii) 19 May 2005 (for non-EU EEA third-country routes); and (iii) 1 June 2002 for EU-Swiss routes ('the periods in dispute'). Second, they request the referring court to order the defendants jointly and severally to pay damages and interest for the anticompetitive conduct in question.

18. According to the referring court, in their claims, the applicants rely on the direct effect of Article 101 TFEU to establish competence for the national court, for the periods in dispute, irrespective of the administrative enforcement of competition law.

19. In its order, the referring court considers that it is competent to apply Article 101 TFEU to the conduct in question and for the periods in dispute. However, the referring court notes expressly that that position deviates from the judgment of the High Court of Justice (England and Wales) in *Emerald Supplies Ltd v British Airways Plc*,¹⁵ as upheld by the Court of Appeal (England and Wales) in *La Gaitana Farms SA & Ors v British Airways Plc*.¹⁶

20. Harboursing doubts as to its competence to apply Article 101(1) TFEU and Article 53(1) of the EEA Agreement to the periods in dispute, the Rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In a dispute between injured parties (in the present case shippers, recipients of air cargo services) and air carriers, do the national courts have the power – either because of the direct effect of Article 101 TFEU, or at least of Article 53 [of the EEA Agreement], or on the basis of (the direct effect of) Article 6 of Regulation 1/2003 – to fully apply Article 101 TFEU, or at least Article 53 [of the EEA Agreement], with regard to agreements/concerted practices of air carriers in respect of freight services on flights operated before 1 May 2004 on routes between airports within the [Union] and airports outside the EEA, or, before 19 May 2005, on routes between Iceland, Liechtenstein, Norway and airports outside the EEA, or, on flights operated before 1 June 2002, between airports within the [Union] and Switzerland, also for the period that the transitional regime of Articles 104 and 105 TFEU applied, or does the transitional regime preclude that?'

21. Written observations have been submitted by the applicants, the defendants, the Norwegian Government, the EFTA Surveillance Authority, as well as the Commission. With the exception of the Norwegian Government, those parties also presented oral argument at the hearing that took place on 21 January 2021.

¹⁵ Judgment of the High Court of Justice of England and Wales (Chancery Division), of 4 October 2017 in *Emerald Supplies Ltd v British Airways Plc* [2017] EWHC 2420 (Ch).

¹⁶ Judgment of the Court of Appeal of England and Wales (Civil Division) of 29 January 2019 in *La Gaitana Farms SA & Ors v British Airways Plc* [2019] EWCA Civ 37.

IV. Analysis

22. This Opinion is structured as follows. First, I shall start with a discussion on the legal context of the present case (A). I shall then turn to the application of Article 101(1) TFEU by the referring court (B). Thereafter, I will consider the equivalent rules under the EEA Agreement (C). Finally, I shall conclude with more general observations on the judicial enforcement of competition rules (D).

A. The Treaty framework and the ‘transitional regime’

23. Given the importance of the Treaty framework on the rules of competition in the present case, I find it necessary to begin this Opinion by setting out the various elements of Article 101 TFEU and to closely examine the supposed ‘transitionality’ of the enforcement regime laid down in Articles 104 and 105 TFEU (1). Thereafter, I will summarise briefly the arguments of the parties and place them in the context of the question raised by the referring court (2).

1. ‘Transitionality’ with regard to what?

24. Article 101 TFEU has a simple structure. Its first paragraph prohibits *all* agreements which have as their object or effect the restriction of competition. The second paragraph explains the consequence of that prohibition: that *all* agreements falling within the first paragraph are automatically void. The third paragraph then provides an exception to the prohibition of the first paragraph: ‘... paragraph 1 may ... be declared inapplicable’ in certain cases.

25. Article 101 TFEU is a substantially complete and free-standing provision. It is worded in general terms. It does not refer to any implementing measures, nor is there anything inherent in Article 101 TFEU that would suggest that it is of limited scope or application. Most importantly for the present case, Article 101 TFEU is institutionally blind. It does not favour one (type of) institution over another. In that regard, the wording of that provision can be contrasted with Article 65(4) of the Treaty establishing the European Coal and Steel Community. The latter had specified that ‘the High Authority shall have sole jurisdiction’ to determine whether a prohibited agreement would be compatible with that provision.

26. From its text alone, it is thus difficult to suggest that Article 101 TFEU should be applied differently to *any other* provision in the Treaty which refers to an institution applying EU law, be that an institution of the Member States or the European Union.

27. It is only by virtue of Articles 103 to 105 TFEU that elements of differentiation and ‘transitionality’ are introduced into the application of Article 101 TFEU.

28. Thus, in its first paragraph, Article 103 TFEU explains that it falls to the Council to lay down ‘the appropriate regulations or directives to give effect to the principles set out in’ Article 101 TFEU. The second paragraph provides non-exhaustive examples of how that power may be exercised. For the purposes of the present case, points (b) and (c) are of greatest interest. Respectively, those points deal with the ‘detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision ... and to simplify administration’ and the definition of, ‘in the various branches of the economy, the scope of the provisions of’ Article 101 TFEU. In other words, Article 103 TFEU places on the Council the burden of determining the scope and administrative supervision of Article 101 TFEU.

29. That being said, what happens until such time as the Council decides to exercise its powers, as provided for in Article 103 TFEU?

30. It is here that Articles 104 and 105 TFEU are relevant. Those provisions establish the ‘transitional regime’. Under that regime, the (administrative) authorities of the Member States were responsible for applying the principles (currently) contained in Article 101 TFEU. That included the granting of exemptions under Article 101(3) thereof. During the period of application of that system, the Commission played only a minor role in the enforcement of the competition rules, and only ‘without prejudice’ to the tasks of the national authorities of the Member States.

31. In view of that constitutional framework, the concept of ‘transitional’ regime is something of a misnomer. It is true that, in its *original* wording, Article 87 of the Treaty establishing the European Economic Community (‘the EEC Treaty’) stipulated that the Council must exercise its powers under (what is now) Article 103 TFEU *within three years*. That period lapsed without the Council exercising those powers. Nevertheless, the Treaty of Amsterdam replaced the (by then obsolete) reference to the three-year time limit for implementation with a general duty on the Council to lay down the appropriate regulations and directives in order to ‘give effect’ to (what is now) Article 101 TFEU.¹⁷ In that way, confirming *de iure* what had already been, *de facto*, the case for some time, the supposed ‘transitionality’ of the ‘transitional’ regime established under (what is now) Articles 104 and 105 TFEU has disappeared.

32. Seen in this light, Article 104 TFEU did in fact provide a *default rule* on how to deal with the admissibility of agreements falling within the scope of Article 101 TFEU. Pursuant to that provision, the authorities of the Member States would be competent to ensure compliance with the Treaty rules on competition for an indefinite period *until* such time as the Council takes action by putting in place a different administrative arrangement for enforcing the Treaty rules on competition.

33. In other words, while originally established for a limited period, the ‘transitional’ regime became less and less ‘transitional’ over time, since there was no ‘transition’ in the ordinary sense of the word from one situation to another. Instead, that regime was rather ‘potentially modular’ with regard to the specific elements of the decentralisation (and reallocation) of the competence to enforce certain parts of Article 101 TFEU. The latter point is confirmed by the development of the entire system, which over the years, kept moving back and forth: from total decentralisation to the centralisation of some elements, and then back to a partial de-centralisation again, with the rules on competence set out in Article 103(2) TFEU textually accommodating those changes without any problems.

2. The role of national courts within the ‘transitional regime’

34. Articles 103 to 105 TFEU are silent on the role of the national courts in applying Article 101 TFEU, whether in the context of the ‘transitional’ regime, or otherwise. That is the object of the present case. In effect, the referring court questions whether the prohibition contained in Article 101(1) TFEU can be applied by the national courts, where the anticompetitive practices at issue took place, for the most part, during the period of application of the ‘transitional regime’.

¹⁷ Article 6(46) of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ 1997 C 340, p. 1).

35. At first sight, that discussion may relate to a bygone era. All parties to the present case agree that Regulation No 1/2003 either gave the national courts the power to apply Article 101 TFEU in full, or at least confirmed its existence. However, in practical terms, the resolution of the issue raised by the Rechtbank Amsterdam (District Court, Amsterdam) will affect the wider assertion of private rights designed to obtain the award of damages for loss caused by conduct liable to restrict or distort competition – irrespective of when that conduct took place, and irrespective of which administrative authority investigated that conduct.

36. The applicants in the main proceedings are attempting to assert private rights in this way. That is because, in its 2017 Decision, the Commission found evidence of continuous price coordination practices from 1999 to 2006 in the airfreight sector. However, due to the system of secondary legislation put in place by the Council under Article 103 TFEU, the Commission limited its findings of an infringement of Article 101(1) TFEU and Article 53(1) of the EEA Agreement respectively for EU-third country routes from 1 May 2004 and for non-EU EEA third-country routes from 19 May 2005. Consequently, if the defendants' objections to the competence of the national court were upheld, the period prior to those dates would, in effect, be excluded from the scope of private actions for redress for anticompetitive behaviour under Article 101(1) TFEU.

37. To a large extent, the underlying and general question of the present case is thus whether the application of Article 101(1) TFEU by the national courts can be circumscribed or excluded altogether by secondary legislation restricting administrative enforcement of EU competition rules.

38. In the submissions of the interested parties, the answer to that question is hidden beneath many layers of case-law and secondary legislation. In essence, the applicants, the EFTA Surveillance Authority and the Norwegian Government explain that the 'transitional regime' restricted the enforcement of the principles underlying Article 101(1) TFEU only through the 'administrative route'. That, however, did not limit the direct effect of Article 101(1) TFEU and Article 53(1) of the EEA Agreement while being relied on before the national courts, that is to say the independent 'judicial route'.

39. The defendants, supported, for the most part, by the Commission, dispute that. In their view, the national courts were not competent to apply Article 101(1) TFEU for two reasons. First, the Council, acting under Article 103 TFEU, limited the scope *ratione materiae* of Article 101 TFEU. Therefore, the air transport sector was not fully exposed to the 'principles' contained in that provision prior to the date of application of Regulation No 1/2003. Second, pursuant to the 'transitional regime', only a national competition authority, and in some cases the Commission, could take a position on the compatibility of an anticompetitive agreement with Article 101 TFEU. Given those limitations of Article 101(1) TFEU, the principle of homogeneity requires that the direct effect of Article 53(1) of the EEA Agreement be limited in the same way.

40. To my mind, the correct response to that view derives directly from Article 101 TFEU, Article 53 of the EEA Agreement and the rules on competition writ large. Therefore, I shall now turn to that issue.

B. The application of Article 101(1) TFEU by the referring court in the present case

41. Broadly speaking, three issues ought to be discussed with regard to the application of Article 101(1) TFEU by the national courts. First, the potential limiting effects of the ‘transitional regime’ laid down in Articles 104 and 105 TFEU on Article 101 TFEU in respect of the standard competences of national courts (1). Second, the extent to which the direct effect of principles now contained in Article 101(1) TFEU is relied upon by a party seeking to enforce its rights before the national courts (2). Third, the scope *ratione materiae* of Article 101(1) TFEU in the particular case at issue, namely to the area of air transport (3). I will address each issue in turn.

1. The effect of the ‘transitional regime’ on Article 101 TFEU

42. In their submissions, the defendants argue, in essence, that the ‘transitional regime’ contained in Articles 104 and 105 TFEU deprives the national courts of their competence to apply Article 101 TFEU. In reply to a question put by the Court, the Commission took the same position. In its words, Articles 104 and 105 TFEU could have the effect of ‘pausing’ the competence of the national judiciary to apply Article 101 TFEU in certain circumstances.

43. I do not agree.

44. From the text of Articles 104 and 105 TFEU, I fail to see anything that amounts to a ‘pause button’ in respect of the competence of national courts. In fact, neither provision restricts the application of Article 101 TFEU with regard to national courts. Articles 104 and 105 TFEU merely establish how the administrative enforcement of Article 101 TFEU should take place during the period in time until the Council decides to take action pursuant to Article 103 TFEU. However, this action does not address the *judicial* application of Article 101 TFEU by national courts.

45. To be precise: in my view, judicial application of Article 101(1) TFEU is naturally *not limited to the judicial review* of administrative decisions which previously applied and enforced EU competition rules. The review of an administrative decision applying Article 101(1) TFEU is certainly one of the ways in which national courts may be called upon to apply that provision. There are nonetheless other areas of law or other means of redress within which national courts could possibly, by virtue of EU law or national law, be called upon to apply the same provision: consider, for example, other types of administrative review, civil law actions, or even criminal prosecutions.

46. I consider it important to emphasise this element at the outset. That is because there appears to be a distinct reductionist tendency in the submissions of the defendants and the Commission in this regard. In their view, essentially, the ‘application’ of Article 101 TFEU means the ‘enforcement’ of that provision, which, in turn, is linked to the ‘investigation and imposition of administrative penalties’. That task has been entrusted to the Commission or national administrative authorities only. By that logic, the national courts would, impliedly, be given competence under the ‘transitional regime’ only if they were asked to judicially review the administrative enforcement carried out by the national administrative authority.

47. I do not agree. If a national court had been called upon to apply Article 101(1) TFEU within its scope of competence and existing proceedings, before the Council had put in place secondary legislation to ‘give effect’ to the principles underlying Article 101 TFEU, then *of course* that

national court would have had to give full effect to that provision.¹⁸

48. That is illustrative of a common characteristic that Article 101 TFEU shares with a number of other Treaty provisions, such as Articles 45 and 46 TFEU (the free movement of workers), Article 49 and Article 50(2) TFEU (the freedom of establishment) and Article 157 TFEU (the principle of equal pay for equal work). In all of those cases, as well as others, the Treaty provision concerned first sets out the principle and then goes on to designate the appropriate EU institution(s) that will ‘flesh out’ that principle by adopting additional, specific rules which sometimes even indicate exactly what those ‘implementing’ rules should cover. However, for decades, the approach of this Court has been that, even where the required ‘implementing’ rules are not yet in place, the ‘base principle’, as set out in the Treaty provision, is, if itself directly effective, to be applied independently by all the competent national authorities, including in particular, the national courts, when called upon to apply those provisions to the cases before them.

49. Article 157 TFEU and the principle of equal pay for equal work might provide an illustration in this regard: even before secondary legislation had been put in place to that effect by the EU legislature, it was clear that the national courts were responsible for safeguarding the full effectiveness thereof and were to apply that principle independently of any ‘administrative enforcement’ to (civil) cases brought before them.¹⁹ That conclusion should come as no surprise: the Court has consistently held that the absence of implementing measures, irrespective of the form, does not hinder an individual’s reliance on provisions of EU law having direct effect.²⁰

50. Accordingly, from a structural point of view of the Treaty, the applicability of (what is now) Article 101 TFEU by the national courts has existed from the entry into force of the EEC Treaty. Moreover, the first and second paragraphs of (what is now) Article 101 TFEU produced full effects even before the Council acted pursuant to its ‘empowerment’ under Article 103(1) TFEU.²¹

51. Against that background, it is nonetheless necessary to examine the extent to which Article 101(1) TFEU was indeed *directly effective* prior to the Council laying down ‘the detailed rules for the application of Article 101(3) TFEU’.

2. The direct effect of Article 101(1) TFEU

52. In reply to a question put by the Court, the defendants and the Commission took the view that Article 101(1) TFEU did not have direct effect prior to the Council acting under Article 103(2)(b) TFEU. No other conclusion can be drawn since, already in 1962, the Court had interpreted Article 101 TFEU as constituting an ‘indivisible whole’.²² Moreover, the Court’s judgment in *Courage and Crehan*²³ is evidence of the need for prior action to be taken by the Council, since that case in fact recognised the existence of direct effect only *after* the Council had put in place implementing measures with regard to Article 101 TFEU. Therefore, that provision could not, by itself, be directly effective.

¹⁸ In line with the judgment of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral* (33/76, EU:C:1976:188, paragraph 5).

¹⁹ Already in judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraphs 12, 24 and 39).

²⁰ See, for an illustration, judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraphs 19 and 20); of 17 September 2002, *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 80); and of 4 February 2016, *Ince* (C-336/14, EU:C:2016:72, paragraph 59).

²¹ As also explained below, in points 58 and 70 to 78 of this Opinion, the Council never restricted those effects.

²² Judgment of 6 April 1962, *de Geus* (13/61, EU:C:1962:11, p. 52).

²³ Judgment of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465) (*‘Courage’*).

53. Conversely, the applicants dispute that position, relying primarily on *SABAM*²⁴ to argue that the direct effect of Article 101(1) TFEU requires no prior implementing measures.

54. I agree with the applicants. To my mind, the position of the defendants and the Commission figuratively places ‘the cart before the horse’.

55. It is established case-law that direct effect must be examined having regard to the nature, general scheme and wording of the provision in question.²⁵ A provision will have direct effect, if it is sufficiently clear and precise²⁶ and unconditional.²⁷ As such, there is no need for an entire provision to be directly effective or directly applicable verbatim. Instead, the Court proceeds by extraction: that is, it seeks to determine whether a specific, applicable rule of behaviour can be extracted from the (perhaps longer and more complex) EU law provision.²⁸

56. The judgments in *SABAM* and *Courage and Crehan* are fitting examples of that ‘relational’ approach to direct effect. In *SABAM*, the Court held that the prohibition contained in Article 85(1) of the EEC Treaty (now Article 101(1) TFEU) could be used as a ‘shield’ *in relation to* the specific rights of a songwriter not to have an exclusive assignment clause in a contract with an authors’ royalties collecting society enforced against him.²⁹ Similarly, in *Courage and Crehan*, the Court held that that same provision could be used as a ‘sword’ *in relation to* a claim for damages arising from a contractual clause contrary to Article 85 of the EEC Treaty (now Article 101 TFEU).³⁰ In both cases, the Court thus extracted from Article 101 TFEU *as a whole* that part of the provision which produces direct effect between individuals: the prohibition of certain anticompetitive agreements, contained in the first paragraph of that provision.³¹

57. That prohibition is unequivocal, setting a clear and enforceable legal obligation: ‘thou shalt not cartel’. There is no condition attached to that direction: *any* such agreements between undertakings are ‘incompatible with the internal market’. It is that self-executing right that individuals derive directly from the Treaty, which they may invoke in order to advance their claim, and which national courts must safeguard.³²

58. Contrary to what the Commission argued at the hearing, the nature of the rights protected by Article 101(1) TFEU is unaffected by the *procedural assignment*, under Article 103(2)(b) TFEU, of which institution could procedurally ‘clear’ an agreement under Article 101(3) TFEU. Indeed, it is self-evident that, in certain cases, a court has only to apply Article 101(1) TFEU to award civil damages in the case of anticompetitive activity.³³ Likewise, a court may only have to rely on Article 101(2) TFEU to determine the severance of incompatible contractual clauses.³⁴ In other

²⁴ Judgment of 30 January 1974, *BRT and Société belge des auteurs, compositeurs et éditeurs* (127/73, EU:C:1974:6) (*‘SABAM’*).

²⁵ See, for example, judgment of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraph 12).

²⁶ See, for example, judgments of 1 July 2010, *Gassmayr* (C-194/08, EU:C:2010:386, paragraph 45); of 7 September 2017, *H.* (C-174/16, EU:C:2017:637, paragraph 69); and of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 72).

²⁷ See, for example, judgments of 15 May 2014, *Almos Agrárkölkereskedelmi* (C-337/13, EU:C:2014:328, paragraph 32); of 12 October 2017, *Lombard Ingatlan Lízing* (C-404/16, EU:C:2017:759, paragraph 36); and of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel* (C-387/19, EU:C:2021:13, paragraph 46).

²⁸ Judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraphs 30 to 39). See also the Opinion of Advocate General Trabucchi in *Defrenne* (43/75, EU:C:1976:39, operative part) and my Opinion in *Klohn* (C-167/17, EU:C:2018:387, point 42).

²⁹ *SABAM*, paragraph 16.

³⁰ *Courage*, paragraphs 24 to 26.

³¹ *SABAM*, paragraph 16, and *Courage*, paragraphs 23 and 24.

³² To that effect, see judgment of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraphs 20 and 22 and the case-law cited).

³³ See, for example, *Courage*, paragraph 26.

³⁴ See judgment of 18 December 1986, *VAG France* (10/86, EU:C:1986:502, paragraph 15).

words, in view of the *specific nature of certain claims* before a national court, the individual components of Article 101 TFEU may very well be *severable*. In such circumstances, there is no need for the national courts to have recourse to Article 101(3) TFEU.

59. In fact, the judgments in *SABAM* and *Courage and Crehan* demonstrate perfectly the independent relationship between the first and third paragraphs of Article 101 TFEU. Both cases arose during a period in which the Council had exercised its powers under Article 103(2)(b) TFEU and had assigned to the Commission sole competence to take a decision pursuant to Article 85(3) of the EEC Treaty (now Article 101(3) TFEU). The fact that another institution, the Commission, was in charge of deciding on the applicability of the then Article 85(3) of the EEC Treaty was not an issue for the enforceability of the rights contained in Article 85(1) of the EEC Treaty.³⁵

60. That conclusion is not affected by the ‘indivisible whole’ description of Article 85 of the EEC Treaty in *de Geus*.³⁶ In that case, a German distributor of Bosch refrigerators invoked Article 85 of the EEC Treaty in its defence so as to annul an ‘export ban’ clause in an exclusive distribution agreement it had concluded with Bosch. However, the facts of that case arose prior to the entry into force of Regulation No 17/62. That meant that *no administrative procedure* to deal with the effects flowing from Article 85(1) and (2) of the EEC Treaty (now Article 101(1) and (2) TFEU) was in place. Against that background, the Court was left with no choice but to continue giving effect to the agreement at issue, *until there was any administrative procedure in place* to deal with a possible application of Article 85(3) of the EEC Treaty (now Article 101(3) TFEU).³⁷

61. It was within those factual confines that the Court held Article 85 of the EEC Treaty to be an ‘indivisible whole’.³⁸ The opposite interpretation would lead to an inadmissible result: ‘to render agreements automatically void before it is even possible to tell which are the agreements to which Article 85 as a whole applies’.³⁹

62. The judgment in *de Geus* was thus delivered in the light of an institutional failure to provide an administrative arrangement to deal with the effects of the ‘applicability [of Article 85 of the EEC Treaty] from the time of entry into force of the Treaty’.⁴⁰ As the EFTA Surveillance Authority correctly states, at that point in time, the issue of direct effect (and thus the individual invocation of Article 85(1) of the EEC Treaty before the national courts) did not arise, since *de Geus* was decided *before* the Court first clarified the concept of the direct effect of provisions of the EEC Treaty.⁴¹

63. For all those reasons, I find that only very limited guidance can be drawn from a judgment of this Court handed down in 1962 in very different legal and constitutional circumstances. In particular, in the absence of any direct effect of the Treaty provisions, naturally only the issue of expressly attributed administrative enforcement competence, or rather the absence thereof, would indeed have been conclusive.

³⁵ See also *SABAM*, paragraph 21, and *Courage*, paragraphs 22 and 28.

³⁶ See judgments of 6 April 1962, *de Geus* (13/61, EU:C:1962:11, p. 52), and of 9 July 1969, *Portelange* (10/69, EU:C:1969:36, paragraphs 10 and 13).

³⁷ Judgment of 6 April 1962, *de Geus* (13/61, EU:C:1962:11, pp. 51 to 53).

³⁸ *Ibid.*, p. 52.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, p. 51.

⁴¹ Judgment of 5 February 1963, *van Gend & Loos* (26/62, EU:C:1963:1, p. 13).

64. I am also not convinced by the submissions of the defendants as concerns *Asjes and Others*⁴² and *Saeed Flugreisen and Silver Line Reisebüro*,⁴³ relied on in support of their position on the question of the direct effect of Article 101(1) TFEU. Those cases were not decided in the context of a party invoking the direct effect of that provision. Instead, the issue concerned the automatic *invalidity* under Article 85(2) of the EEC Treaty of government-approved airline tariffs prior to a decision on their compatibility with Article 85(3) of the EEC Treaty being taken by an administrative authority, be that pursuant to the system applicable under the ‘transitional period’ referred to in Articles 88 and 89 of the EEC Treaty (now Articles 104 and 105 TFEU) or Regulation No 3975/87).⁴⁴ Since neither the ‘authorities of the Member States’⁴⁵ nor the Commission⁴⁶ had decided on the applicability of Article 85 of the EEC Treaty to the agreements in question, the Court held that such agreements could not be presumed to be automatically void simply because Article 85 of the EEC Treaty could be applicable to the agreements in question.

65. The judgments in *Asjes and Others* and *Saeed Flugreisen and Silver Line Reisebüro* are thus also trapped in the logic of their time: in circumstances where no administrative decision had been taken by the authorities of the Member States or the Commission as regards an allegedly anticompetitive agreement or practice under Article 85(3) of the EEC Treaty, but *future retroactive clearance remained possible* under the system in place at the time, it was obvious that economic operators had to be able to assume, in good faith, that their commercial relations were not automatically terminated *until* the administrative authorities concerned had taken a decision on their agreements or practices.⁴⁷

66. In the present case, more importantly, the defendants *cannot rely on the risk of conflict* arising from a possible retroactive approval of the conduct in question. Indeed, the ‘exemption’ system of Regulation No 1/2003, as amended, which repealed the previous regime under Regulations No 17/62 and No 3975/87, does not allow for retroactive action. Furthermore, as Article 34(1) of Regulation No 1/2003 demonstrates, agreements that did fall within the scope of Regulations No 17/62 and No 3975/87, and which *were* notified to the Commission, lapsed with effect from 1 May 2004. In other words, even if the defendants had notified their agreements to the Commission,⁴⁸ those notifications would not, in any event, work as a ‘backstop’ to the treatment of said agreements under the system put in place by Regulation No 1/2003.

67. Thus again, it is worth pointing out specifically that in the circumstances of the present case, the key internal coherence of the ‘Article 101 TFEU imperative’, as well as the need for legal certainty for economic operators, are not present. That window has been closed for some time.

68. In summary, it is thus clear that Article 101(1) TFEU and its predecessors were directly applicable from the entry into force of the EEC Treaty. They remained directly effective throughout that period so that individuals could enforce their rights before the competent national courts. Above all, this independent power conferred on the national courts to apply

⁴² Judgment of 30 April 1986, *Asjes and Others* (209/84 to 213/84, EU:C:1986:188). (*‘Asjes’*).

⁴³ Judgment of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro* (66/86, EU:C:1989:140) (*‘Saeed’*).

⁴⁴ *Saeed*, paragraphs 29, and *Asjes*, paragraphs 52 to 56 and 59.

⁴⁵ *Saeed*, paragraphs 4 and 29, and *Asjes*, paragraph 57.

⁴⁶ *Saeed*, paragraphs 4 and 29, and *Asjes*, paragraph 59.

⁴⁷ See, by analogy, the reasoning pursued by the Court in the judgment of 22 March 1961, *Snupat v High Authority* (42/59 and 49/59, EU:C:1961:5, p. 87).

⁴⁸ An element that the applicants in the main proceedings deny, but which remains ultimately for the referring court to verify.

Article 101(1) TFEU in accordance with that power and in line with the type of proceedings brought before them under national law, had in fact never been restricted by the Council by the application of what is now Article 103 TFEU.

69. However, the question remains whether there are or were any restrictions as to the application *ratione materiae* of Article 101(1) TFEU to the specific case of the air transport sector.

3. *The scope ratione materiae of Article 101(1) TFEU*

70. The defendants and the Commission argue that since the Council did not exercise its competence under Article 103(2)(c) TFEU to open the entirety of the air transport sector to the competition rules of the Treaty, the national courts could not have acted in an action brought under Article 101(1) TFEU to declare such agreements incompatible. That is, even if direct effect had been available. Those parties point to the specific exclusion of the entire air transport sector from Regulation No 17/62 and the limited opening of the rules on competition to ‘intra-EU routes’ on air transport by means of Regulation No 3975/87. Only from 1 May 2004, the date of application of Regulation No 1/2003, as amended, would the air transport sector have been opened up to the rules of EU competition law.⁴⁹

71. I do not agree with those arguments.

72. By virtue of Article 103(1) TFEU, the Council is to lay down ‘the appropriate regulations or directives to give effect to the principles set out in’ Article 101 TFEU. Article 103(2) TFEU then lists examples of how that endeavour may be achieved by the Council. Point (c) states that the Council may ‘define, if need be, in the various branches of the economy’, the scope of Article 101 TFEU.

73. The expressly *optional* nature of that action is what distinguishes point (c) from point (b) of Article 103(2) TFEU and the *requirement* to ‘flesh out’ Article 101(3) TFEU. Indeed, the reference in point (c) of that article to the words ‘if need be’⁵⁰ indicates clearly that the scope of the principles contained in Article 101 TFEU was, *by default*, intended to cover the whole of the economy, with the Council deciding whether to depart from that default state of affairs for specific branches of the economy.

74. The single market imperative behind that arrangement is uncanny: naturally, the scope of Article 101 TFEU could have been drafted with a view of gradually enlarging, in ‘digestible’ pieces, the scope of EU competition law. In this way, for the particular area of transport, as was done in the case of common agricultural policy, precedence could have been given to those sectoral (specific) approaches over the (general) rules on competition.⁵¹

75. However, that is not the case.⁵² Thus, in my view, and particularly in the light of the structure of Articles 101 and 103 TFEU, the Treaty commences from the vantage point of full application of competition rules to all branches of the economy. In order to achieve that task, it set out a

⁴⁹ See Article 45 of Regulation No 1/2003.

⁵⁰ In similar vein ‘v případě potřeby’ in Czech; ‘in voorkomende gevallen’ in Dutch; ‘eventualmente’ in Italian; ‘le cas échéant’ in French; ‘gegebenfalls’ in German; or ‘eventualmente’ in the Spanish language version.

⁵¹ See, in that regard, Article 42 TFEU and judgment of 14 November 2017, *APVE and Others* (C-671/15, EU:C:2017:860, paragraphs 36 to 38).

⁵² *Asjes*, paragraph 45.

generally unrestricted *ratione materiae* of Article 101 TFEU in the interest of achieving a functioning single market,⁵³ subject only to the ‘if need be’ possibility of the specific sectoral exclusion contained in Article 103(2)(c) TFEU.

76. Contrary to the submissions of the defendants and the Commission, Regulations No 17/62 and No 3975/87 do not demonstrate that the Council sought to limit the scope *ratione materiae* of Article 101(1) TFEU. Indeed, Regulation No 17/62 principally set up a *procedural* system for the application by the Commission of (then) Article 85(1) and (3) of the EEC Treaty (now Article 101(1) and (3) TFEU).⁵⁴ It stated nothing about the scope *ratione materiae* of Article 101(1) TFEU. Similarly, Regulation (EEC) No 141/62 of the Council amending Regulation No 17/62 merely provided that the *administrative* system set up by Regulation No 17/62 should not apply to the transport sector (and thus to air transport).⁵⁵ That exclusion, however, does not relate to the scope *ratione materiae* of Article 101(1) TFEU when applied by the national courts to the air transport sector.

77. Finally, Regulation No 3975/87 partially ‘opted-in’ the air transport sector solely for the *administrative* application of EU competition rules. As explained in the second recital of that regulation, that partial opt-in was necessary given that ‘the Commission [had] no means ... of investigating directly cases of suspected infringement of Articles 85 and 86 of the Treaty in air transport’.⁵⁶ Again, however, that regulation contains no limitation on the scope of Article 101(1) TFEU in a private damages action before the national courts.

78. In other words, the entire arrangement of allegedly excluding the area of air transport from (what is now) Article 101 TFEU was limited to the *administrative* enforcement of the principles contained in that provision.⁵⁷ Regulations No 17/62 and No 3975/87 did not affect the *judicial* application by the national courts, within the scope of the respective powers, which they possessed independently under national law, of the principles now contained in Article 101(1) TFEU.⁵⁸ Indeed, in this regard, I agree with the applicants and the EFTA Surveillance Authority: that ‘parallel route’ of possibly enforcing the prohibition laid down in Article 101(1) TFEU remained unaffected by the secondary legislation put in place by the Council.

79. Therefore, the absence of any specific rules in national law governing the judicial application of Article 101 TFEU cannot preclude the Rechtbank Amsterdam (District Court, Amsterdam) from applying Article 101(1) TFEU to the air transport sector, where that provision is relied on before it for the purpose of obtaining a declaratory judgment and an award of damages arising from the anticompetitive conduct of the defendants for EU-third country routes prior to 1 May 2004.

⁵³ See, to that effect, judgment of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 36).

⁵⁴ See, for example, the second, sixth and eighth recital of Regulation No 17/62. See also Article 2, Article 6(1), Article 8(1) and Article 9(3) of that regulation.

⁵⁵ As explained in the first recital of Regulation No 141/62 (OJ English Special Edition, Series I 1959-1962, p 291). See also Article 1 thereof.

⁵⁶ Second recital of Regulation No 3975/87.

⁵⁷ As the Commission itself explained in its submissions in *Asjes*, ‘the absence of the implementing measures referred to in Article 87 [relating to the *ratione materiae* of Article 85 of the EEC Treaty] does not mean that national courts cannot, where the matter arises, be called upon to rule on the compatibility of an agreement or a particular practice with the competition rules since those rules have direct effect’.

⁵⁸ As already explained above in points 43 to 47 of this Opinion, by merely allocating administrative competence to deal with certain investigations into possible infringements of competition law, those regulations indirectly also allocated competence to carry out judicial review of those administrative decisions (see Article 9 of Regulation No 17/62 and Article 7 of Regulation No 3975/87, respectively). However, and once again, those provisions naturally did not have any impact on other possible instances of judicial application of Article 101 TFEU in any *other type of proceedings* in which that application may have arisen before national courts.

C. The relationship between Article 53 of the EEA Agreement and EU primary competition rules

80. The Norwegian Government and the EFTA Surveillance Authority submit that, since Article 53 of the EEA Agreement is identical in substance to Article 101 TFEU, the principle of homogeneity demands that those two provisions be interpreted uniformly. At the hearing, the EFTA Surveillance Authority also explained that the absence of an equivalent provision to Article 104 TFEU in the EEA Agreement would not affect such a homogenous reading of Article 101 TFEU and Article 53 of the EEA Agreement because, in any event, Article 104 TFEU does not limit Article 101 TFEU.

81. The Commission agrees that Article 101 TFEU and Article 53 of the EEA Agreement need to be read in harmony. However, at the hearing, it questioned whether the absence of a provision equivalent to Article 104 TFEU would not affect that task, particularly since the effect of Articles 104 and 105 TFEU would be to remove the competence of the national courts to apply directly Article 101(1) TFEU.

82. In essence, the defendants take the same position as the Commission in this regard. In their view, the ‘transitional regime’ under Articles 104 to 105 TFEU prevented Article 101(1) TFEU from being directly effective, so that Article 53(1) of the EEA Agreement must also be interpreted as not having direct effect prior to the Joint Committee declaring Regulation No 1/2003 applicable in the EEA from 19 May 2005.

83. In the light of my conclusions in Section B of this Opinion, I agree with the submissions of the Norwegian Government and the EFTA Surveillance Authority.

84. It is uncontested that the EEA Agreement constitutes an integral part of EU law.⁵⁹ Where its provisions are unconditional and sufficiently precise, they have direct effect in the Member States.⁶⁰ The Court has also held that, under the principle of homogeneity,⁶¹ provisions of the EEA Agreement, which are identical in substance to those of the Treaty, must be interpreted uniformly.⁶²

85. Article 101 TFEU and Article 53 of the EEA Agreement respectively lay down a prohibition; the effect of that prohibition; and a possible derogation from that prohibition. In view of the principle of homogeneity, those two provisions must therefore be interpreted uniformly.⁶³ Accordingly, as is the case for Article 101(1) TFEU, Article 53(1) of the EEA Agreement must also be found to produce direct effect and create rights in respect of the individuals concerned, which the national courts must safeguard.⁶⁴

⁵⁹ Judgments of 15 June 1999, *Andersson and Wåkerås-Andersson* (C-321/97, EU:C:1999:307, paragraphs 26 and 27), and of 2 April 2020, *Ruska Federacija* (C-897/19 PPU, EU:C:2020:262, paragraph 49 and the case-law cited).

⁶⁰ See, in this regard, judgments of 5 February 1976, *Conceria Bresciani* (87/75, EU:C:1976:18, paragraph 25), and of 26 October 1982, *Kupferberg* (104/81, EU:C:1982:362, paragraph 23). With regard to the EEA Agreement, see judgment of 22 January 1997, *Opel Austria v Council* (T-115/94, EU:T:1997:3, paragraphs 101 and 102).

⁶¹ See Articles 6, 105 and 106 of the EEA Agreement and Article 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

⁶² Judgments of 23 September 2003, *Ospelt and Schlössle Weissenberg* (C-452/01, EU:C:2003:493, paragraph 29 and the case-law cited), and of 6 October 2009, *Commission v Spain* (C-153/08, EU:C:2009:618, paragraphs 48 and 49).

⁶³ See, by analogy, judgment of the EFTA Court of 30 May 2018, *Fjarskipti v Síminn* (E-6/17, EFTA Court Report 2018, p. 81, paragraph 28).

⁶⁴ *Ibid.*, paragraphs 29 and 32 and the case-law cited. See also judgment of the EFTA Court of 17 September 2018, *Nye Kystlink AS v Color Group AS and Color Line AS* (E-10/17, EFTA Court Report 2018, p. 293, paragraph 71).

86. In the light of the equivalence between the effect of Article 101 TFEU and Article 53 of the EEA Agreement, I do not see how my conclusions reached in points 55 to 68 of this Opinion on Article 101(1) TFEU should be any different for Article 53(1) EEA Agreement. Therefore, the national courts are able to apply Article 53(1) of the EEA Agreement to find certain anticompetitive conduct incompatible with that provision.

87. For reasons similar to those concerning Article 101 TFEU, I must also dismiss the arguments of the defendants as to the limited scope *ratione materiae* of Article 53(1) of the EEA Agreement. It is true that Article 1 of Protocol 21 of the EEA Agreement explains that the EFTA Surveillance Authority must first ‘give effect to the principles laid down in’ Article 53 of the EEA Agreement. To that effect at least, it mirrors Article 103 TFEU. However, there is nothing in the case file to suggest that Article 1 of Protocol 21 of the EEA Agreement has been used to limit either the scope of Article 53 of the EEA Agreement or the competence of the national courts to apply that provision. Indeed, as I have explained in points 76 to 78 of this Opinion, the various acts of secondary law enacted by the Council pursuant to Article 103(2)(c) TFEU, and incorporated into the EEA Agreement from the date of notification thereof, have never had the effect of limiting the scope *ratione materiae* of Article 53 of the EEA Agreement.

88. The absence of a provision equivalent to Article 104 TFEU in the EEA Agreement does not affect that conclusion. As I have explained in point 44 of this Opinion, the effect of Article 104 TFEU is not to curb the structural scope or application of Article 101 TFEU. Its absence thus cannot affect the scope or application of Article 53 of the EEA Agreement. In any event, Article 104 TFEU was intended to bridge the period between the entry into force of the competition rules of the Treaty and the moment in which the Council acts to put in place an administrative arrangement to deal with Article 101 TFEU, and in particular its third paragraph.⁶⁵

89. However, such a transitional period never even arose for the EEA Agreement. Regulations No 17/62, No 141/62, and No 3975/87 became part of the EEA Agreement under Annex XIV from the date of notification of that agreement. Similarly, Article 56 of the EEA Agreement does not affect that conclusion since it merely sets out the shared (and duopolised) competence between the Commission and the EFTA Surveillance Authority to apply Article 53 of the EEA Agreement.⁶⁶

90. Therefore, to my mind, there are also no restrictions to the scope *ratione materiae* of Article 53(1) of the EEA Agreement that would hinder the ability of the applicants to rely on the direct effect of Article 53(1) of the EEA Agreement before the referring court to request a declaratory judgment and damages in relation to the defendants’ coordination of various elements of the price to be charged for airfreight services on non-EU EEA third-country routes prior to 19 May 2005.

D. The bigger picture: the public and the private enforcement of competition rules

91. Although also part of the referring court’s question, in view of the conclusions already reached in this Opinion, I do not consider it necessary to address separately the nature of Article 6 of Regulation No 1/2003. Indeed, as suggested in the preceding sections, the courts of the Member States have always been competent to apply (the substantive prohibition contained in)

⁶⁵ See above, points 30 to 33 of this Opinion.

⁶⁶ See paragraph 29 of the Notice on cooperation between national courts and the EFTA Surveillance Authority in applying Articles 53 and 54 of the EEA Agreement (OJ 1995 C 112, p. 7).

Article 101(1) TFEU *within their respective powers and for the purposes of the proceedings before them*. There is therefore little need for the Court to consider in the context of the present case whether, and from exactly what point in time, there was also a secondary law ‘source’ of empowerment under Article 6 of Regulation No 1/2003.

92. Once again, I wish to stress ‘within “the respective powers”’ that those national courts already enjoy under national law. As the defendants and the Commission correctly point out, the ‘transitional regime’ of Articles 103 and 104 TFEU did not provide the national courts with any express powers. Indeed, the national courts cannot derive, in the absence of any national law making express provision to that effect, from Article 101(1) TFEU or Article 53(1) of the EEA Agreement, investigative or prosecutorial powers similar to those bestowed on the competent administrative authorities of the Member States which are normally tasked with investigating competition law infringements in dedicated administrative or even criminal proceedings. However, by the same token, that framework also *could not have taken anything away* from the national courts. Simply put, that constitutional framework has neither given to, nor taken anything away from, the national courts. No form of primary or secondary EU law sought to limit the competence of national courts to apply directly Article 101(1) TFEU or Article 53(1) of the EEA Agreement, where those provisions are relied upon in a case before them, to protect the subjective rights derived from EU law.

93. The action for liability sought by the applicants in the present case illustrates that point. Much like any other national court in the European Union, the referring court is competent to determine such liability under the relevant national rules. For the purposes of an assessment of a wrong giving rise to such liability, the question of whether an undertaking did or did not breach its legal obligations is typically the first element to be established in that regard. However, that assessment is naturally part of the (private law) decision on potential liability, not a public law (and administrative authority driven) enforcement regime.

94. If that were not the case, such enforcement actions would only ever be of a ‘follow-on’ nature, in essence dependent on a previous (and presumably identical in scope) public law declaration to that effect. In all other instances, ‘stand-alone’ actions would be excluded from the scope of Article 101(1) TFEU.

95. However, that view (or certainly that outcome) is simply incompatible with the nature of the system and the case-law of this Court.⁶⁷ Certainly, in view of the rather heavy evidentiary burden that any claimant is likely to face in ‘stand-alone’ private law actions for infringements of competition law, such actions are likely to be rare in practice. Therefore, the decision of a public authority, such as the Commission, in a parallel or prior investigation is likely to be of paramount importance for ‘stand-alone’ actions.⁶⁸ However, it is incorrect to state that, as a matter of law, the need for consistency and coordination in this area of law means precluding national courts from exercising their duties under EU and national law: protecting individual rights derived also from directly effective provisions of EU law.

⁶⁷ See, amongst others, judgments of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraph 26); of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 60); of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 41); of 6 June 2013, *Donau Chemie and Others* (C-536/11, EU:C:2013:366, paragraph 21); of 14 June 2011, *Pfleiderer* (C-360/09, EU:C:2011:389, paragraph 28); of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 21); of 14 March 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204, paragraph 25); and of 12 December 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraph 22).

⁶⁸ Also, in order to forestall any risk of conflicting decisions – see, in general, judgment of 14 December 2000, *Masterfoods and HB* (C-344/98, EU:C:2000:689, paragraphs 59 and 60), if need be giving rise to a ‘Zwartveld request’ – see order of 13 July 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:315, paragraph 22).

96. The peculiar nature of such a proposition becomes even more obvious if one were to consider the standard way in which any other area of administrative law is enforced, be it, for example, environmental law, public health, public safety, or the rules relating to safety at work. In those areas, there is likely to be a dedicated, specialised public authority at the national level tasked with supervising and enforcing the relevant substantive standards. However, would anybody suggest that just because a given public authority did not investigate or prosecute (or actually did, but for whatever reason discontinued or limited the administrative proceedings), that the same behaviour could not give rise to private law claims for compensation by the potentially injured person?

97. For all those reasons, I cannot agree with the insightful analysis of the High Court of England and Wales in *Emerald Supplies Ltd v British Airways Plc*,⁶⁹ invoked by the referring court and discussed by the parties in the present proceedings. As I was seeking to highlight in the previous sections of this Opinion, first, the competence of the national courts to apply the substance of Article 101(1) TFEU independently, within their respective scope of powers already provided for in national law, such as the action for damages, did not, in contrast to administrative enforcement, require any express empowerment clause under EU law.⁷⁰ Second, the judgments in *de Geus*, *Asjes* and *Saeed*, are, in my view, partially obsolete. They cannot be applied to the specific circumstances in the main proceedings because none of the issues that conditioned the approach adopted in those cases in fact arise in the case in the main proceedings.⁷¹

98. In other words, while I fully acknowledge the need for Article 101 TFEU to be internally consistent, I simply do not subscribe, in the specific context of the present case, to the *pars pro toto* reduction put forward by certain interested parties. The fact that *a part of the procedure* for the administrative application of Article 101 TFEU was at some stage *centralised* cannot mean that *no one else* could have applied the *substance* deriving from that provision, including in cases in which exemptions or exceptions are clearly not possible.

99. The present proceedings have indeed been an intriguing journey back in time, if not an exercise in legal archaeology, reaching as far back as 1962. However, while this Opinion is largely circumscribed by that now obsolete legal framework, the logic guiding it is not. At the structural level, provisions of EU law, which have direct effect, are by default enforceable before the national courts, irrespective of the potential centralisation of (part of the) administrative competence for their enforcement with certain administrative authorities. In the particular context of competition law, this means that undertakings breaking the rules of fair competition cannot hide behind a lack of administrative enforcement, and must expect that claims for redress will be brought directly before the competent courts of the Member States by the parties they have allegedly injured.

⁶⁹ Judgment of the High Court of Justice of England and Wales (Chancery Division), of 4 October 2017 in *Emerald Supplies Ltd v British Airways Plc* [2017] EWHC 2420 (Ch), as upheld by the Court of Appeal of England and Wales (Civil Division) of 29 January 2019 in *La Gaitana Farms SA & Ors v British Airways Plc* [2019] EWCA Civ 37.

⁷⁰ Contrast with *Emerald Supplies Ltd v British Airways Plc* [2017] EWHC 2420 (Ch), [41] to [52].

⁷¹ Contrast with *Emerald Supplies Ltd v British Airways Plc* [2017] EWHC 2420 (Ch), [53] to [63].

V. Conclusion

100. I propose that the Court answer the question referred for a preliminary ruling by the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) as follows:

A party allegedly injured by the coordination of various elements of the price to be charged by air carriers for airfreight services on routes between airports within the European Union and/or European Economic Area, and between airports within those territories and third countries, can rely on the breach of Article 101(1) TFEU and Article 53(1) of the Agreement on the European Economic Area before a national court to obtain relief from those carriers even for the period during which Articles 104 and 105 TEU were still applicable.